



**OFFICE OF THE ATTORNEY GENERAL**  
**STATE OF ILLINOIS**

**Lisa Madigan**  
ATTORNEY GENERAL

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**OFFICERS:**

Effect of the Supreme Court's  
Imposition of Discipline on a  
State's Attorney

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Mr. Michael P. Coghlan  
Deputy Chief Assistant State's Attorney  
Office of the State's Attorney  
Kane County Judicial Center  
37W777 Route 38, Suite 300  
St. Charles, Illinois 60175

Dear Mr. Coghlan:

I have your letter wherein you inquire, at the request of Kane County State's Attorney Mary Elizabeth "Meg" Gorecki, what effect the Illinois Supreme Court's decision in her disciplinary proceeding will have upon her ability to continue to perform the duties and hold the office of State's Attorney.

In *In re Mary Elizabeth Gorecki*, No. 96299 (Illinois Supreme Court, November 20, 2003) (*see also* supplemental order denying motion for stay of suspension, issued January 13, 2004), the Illinois Supreme Court considered the appropriate sanction to impose based upon Ms.

Gorecki's violation of the Illinois Rules of Professional Conduct "when she left three messages on a telephone answering machine which falsely indicated that the president of the Kane County board could be bribed into providing a county job." Slip op. at 1. The Court found that "[r]epresentations such as those made by [Ms. Gorecki] undermine public confidence in the integrity of the government and \* \* \* merit a suspension" of four months. Slip op. at 15-16. Ms. Gorecki's suspension from the practice of law for violating the Illinois Rules of Professional Conduct will take effect on February 1, 2004.

In my opinion, it is clear that the discipline imposed on Ms. Gorecki for her serious violation of the Rules of Professional Conduct will preclude her from practicing law and, as a result, from exercising the powers of the office of State's Attorney during the four-month period of her suspension. You have also specifically inquired whether the suspension of Ms. Gorecki's law license disqualifies her from continuing to hold the office of State's Attorney until the completion of her term. This appears to present a question of first impression in Illinois. For the reasons discussed below, it is my opinion that the suspension imposed as a result of Ms. Gorecki's misconduct does not disqualify her from holding the position of State's Attorney or create a vacancy in that office. However, because Ms. Gorecki is disqualified from engaging in the practice of law for four months, her Assistant State's Attorneys, who derive their power from the State's Attorney, also are impacted by this suspension. To ensure that the State's Attorney's office will continue to fulfill its duties, the circuit court may, in its discretion, appoint a Special State's Attorney to serve during the period of Ms. Gorecki's disciplinary suspension.

Article VI, section 19 of the Illinois Constitution of 1970, which establishes the office of State's Attorney, provides:

A State's Attorney shall be elected in each county in 1972 and every fourth year thereafter for a four year term. One State's Attorney may be elected to serve two or more counties if the governing boards of such counties so provide and a majority of the electors of each county voting on the issue approve. *A person shall not be eligible for the office of State's Attorney unless he is a United States citizen and a licensed attorney-at-law of this State.* His salary shall be provided by law. (Emphasis added.)

Under the plain language of the Constitution, only "a licensed attorney-at-law of this State" meets the qualification requirements for the office of State's Attorney. The term "licensed attorney-at-law" is not defined in the Illinois Constitution, nor do the debates concerning the drafting and adoption of the provisions of the Illinois Constitution of 1970, or those relating to the 1962 amendments to article VI, section 21 of the Illinois Constitution of 1870, from which the current constitutional provision is derived, discuss the meaning of that term. The "Historical and Practice Notes" accompanying article VI, section 21 of the Illinois Constitution of 1870, however, indicate that by adding the requirement that a State's Attorney be a licensed attorney, the Joint Committee of the Illinois State Bar Association and the Chicago Bar Association that proposed the relevant revisions meant to require that a State's Attorney be a member of the Illinois bar. *See Ill. Ann. Stat., 1970 Ill. Const., art. VI, Introduction, at 3 (Smith-Hurd 1964); Ill. Ann. Stat., 1970 Ill. Const., art. VI, sec. 21, Historical and Practice Notes, at 166 (Smith-Hurd 1964).* The "Constitutional Commentary" relating to article VI, section 19 of the

Illinois Constitution of 1970 states: "Section 19 continues the requirement that a State's Attorney be a licensed Illinois attorney-at-law" (ILCS Ann., 1970 Ill. Const., art. VI, sec. 19, Constitutional Commentary, at 487 (Smith-Hurd 1993)).

It is therefore necessary to determine what effect the suspension of Ms. Gorecki's license to practice law has upon her continued membership in the Illinois bar. This, in turn, will determine whether she continues to meet the qualifications for the office of State's Attorney.

The Court suspended Ms. Gorecki's license to practice law "for a specified period of time" pursuant to the provisions of Supreme Court Rule 771(d) (134 Ill. 2d R. 771). The Rules on Admission and Discipline of Attorneys do not specifically address the effect that a suspension imposed upon a government attorney or prosecutor will have upon his or her ability to continue to serve in that capacity. Moreover, our review of reported cases indicates that neither the appellate court nor the Supreme Court has decided a case in which a State's Attorney has been disciplined during his or her term of office. Thus, the result will necessarily depend upon the rules that apply generally to all attorneys.

The Supreme Court Rules do not address the impact of a suspension of less than six months on a disciplined attorney. In fact, the Supreme Court has noted that the limitations placed on attorneys who are suspended for less than six months are not entirely clear. *In re Howard*, 188 Ill. 2d 423, 439-40 (1999). Supreme Court Rule 764 (134 Ill. 2d R. 764), however, applies when an attorney is suspended for six months or more and is instructive here. Among its

requirements, Supreme Court Rule 764 mandates that an attorney whose license is suspended for six months or more must withdraw from the practice of law. This rule also provides that compliance with its requirements is "a condition to the reinstatement of the disciplined attorney."

Thus, with respect to suspensions of six months or more, reinstatement is made upon petition to, and is at the discretion of, the Supreme Court. Because reinstatement in these circumstances is discretionary with the Court, an attorney's license cannot be considered to be currently valid. *See generally In re Discipio*, 163 Ill. 2d 515, 525-26 (1994). In the absence of a Rule providing otherwise, it appears that an attorney who has been suspended from the practice of law for less than six months and who has complied with any requirements imposed by the Court would be reinstated on the master roll of attorneys as a matter of course at the conclusion of the suspension. Consequently, an attorney who is suspended for less than six months must temporarily withdraw from the exercise of the powers, prerogatives and privileges of a member of the bar, but does not forfeit his or her license to practice law. Based on this analysis, it is my opinion that Ms. Gorecki will be prohibited from engaging in the practice of law for four months beginning on February 1, 2004, although she will remain a "licensed attorney-at-law" for purposes of the qualification requirements of article VI, section 19 of the Illinois Constitution.

This conclusion necessarily requires resolution of another critical issue: Does the imposition of a suspension from the practice of law upon an incumbent State's Attorney cause her office to become vacant? Section 25-2 of the Election Code (10 ILCS 5/25-2 (West 2002)), which addresses vacancies in elective office, provides, in pertinent part:

Every elective office shall become vacant on the happening of any of the following events before the expiration of the term of such office:

- (1) The death of the incumbent.
- (2) His or her resignation.
- (3) His or her becoming a person under legal disability.
- (4) His or her ceasing to be an inhabitant of the State; or if the office is local, his or her ceasing to be an inhabitant of the district, county, town, or precinct for which he or she was elected; provided, that the provisions of this paragraph shall not apply to township officers whose township boundaries are changed in accordance with Section 10-20 of the Township Code, nor to township or multi-township assessors elected under Sections 2-5 through 2-15 of the Property Tax Code.
- (5) His or her conviction of an infamous crime, or of any offense involving a violation of official oath.
- (6) His or her removal from office.
- (7) His or her refusal or neglect to take his or her oath of office, or to give or renew his or her official bond, or to deposit or file such oath or bond within the time prescribed by law.
- (8) The decision of a competent tribunal declaring his or her election void.

Conspicuously absent from the provisions of section 25-2 of the Election Code is any reference to a vacancy occurring because of the temporary suspension of an officeholder's professional license. In the absence of such a provision, the occurrences enumerated in section

25-2 do not apply to these circumstances to create a vacancy in the office of Kane County State's Attorney. Subsections 25-2(1) and (2) clearly do not apply. Although the phrase "person under legal disability" as used in subsection 25-2(3) is not defined in the Election Code (10 ILCS 5/1-1 *et seq.* (West 2002)), it is defined in section 1.06 of the Statute on Statutes (5 ILCS 70/1.06 (West 2002)) as follows:

"Person under legal disability" means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate, or (b) is a person with mental illness or is a person with developmental disabilities and who because of his or her mental illness or developmental disability is not fully able to manage his or her person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his or her estate as to expose himself or herself or his or her family to want or suffering.

The current language of section 1.06 of the Statute on Statutes was enacted by Public Act 83-706, effective September 23, 1983, as part of a comprehensive revision of State statutes to replace anachronistic terms such as "insane person," "lunatic," "idiot," "mental incompetent" and "habitual drunkard." Accordingly, Public Act 83-706 added the definition found in section 1.06 of the Statute on Statutes and amended the third clause of section 25-2 of the Election Code by substituting the defined term "person under a legal disability" for the term "insane."

Clearly, therefore, a legal disability, in the context of subsection 25-2(3) of the Election Code, refers to a condition, such as mental illness or dementia, which renders a person

unable to act for himself or herself or to bind himself or herself so that the law will regard his or her acts as void or voidable. Given this definition, subsection 25-2(3) does not apply to Ms. Gorecki's situation.

Likewise, because she has not moved, been convicted of an offense involving a violation of her official oath of office as a State's Attorney, been removed from office, refused or neglected to take the oath or provide a bond as required by law, or had her election declared void, subsections 25-2(4) through (8) are also not relevant here. Consequently, it is my opinion that for purposes of subsection 25-2 of the Election Code, the suspension of Ms. Gorecki's law license will not work a vacancy in the office of State's Attorney of Kane County.

The suspension will, nonetheless, significantly affect the operation of the State's Attorney's office because an attorney whose license has been suspended cannot engage in "the practice of law." *See, e.g., In re Merriwether*, 138 Ill. 2d 191, 203 (1990); *In re Harth*, 125 Ill. 2d 281, 291 (1988); *In re Freiman*, 118 Ill. 2d 341, 345 (1987); *In re Levin*, 77 Ill. 2d 205, 211 (1979); *In re Larsen*, 358 Ill. 103, 105 (1934). In reviewing whether a suspended attorney has improperly engaged in the practice of law, the Supreme Court has stated:

Determining what conduct constitutes "practicing law" defies mechanistic formulation. *In re Discipio*, 163 Ill. 2d 515, 523 (1994); *People ex rel. Chicago Bar Ass'n v. Barasch*, 406 Ill. 253, 256 (1950). However, as we have consistently held, *the practice of law encompasses not only court appearances, but also services rendered out of court (People ex rel. Chicago Bar Ass'n v. Barasch*, 21 Ill. 2d 407, 414 (1961)), and includes the giving of any advice or rendering of any service requiring the use of legal knowledge (*In re Bodkin*, 21 Ill. 2d 458, 461 (1961); *People ex rel. Illinois State Bar Ass'n v. Peoples Stock Yards State Bank*, 344 Ill. 462, 475-76 (1931); see also *Discipio*, 163 Ill. 2d at 523 (focus of



inquiry whether activity in question required legal knowledge and skill so as to apply legal principles and precedent)). *In re Howard*, 188 Ill. 2d 423, 438 (1999). (Emphasis added.)

Thus, during the period of her suspension, Ms. Gorecki may not undertake any activity requiring the use of legal knowledge or skill, including appearing in court, providing advice to the county board or the various county officers, or supervising the legal work of her assistants.

Moreover, it is well established that although an Assistant State's Attorney is generally clothed with all of the powers and privileges of the State's Attorney, and that all acts performed by an Assistant State's Attorney in that capacity must be regarded as if done by the State's Attorney himself or herself (*Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 303 (1995)), an Assistant State's Attorney's powers are derived from those of the State's Attorney. Thus, if the State's Attorney is disqualified from acting, so also are his or her Assistant State's Attorneys. *People ex rel. Livers v. Hanson*, 290 Ill. 370 (1919); *People ex rel. Elliott v. Benefiel*, 405 Ill. 500 (1950); *People v. Courtney*, 288 Ill. App. 3d 1025 (1997), *appeal denied*, 175 Ill. 2d 535 (1997). Consequently, while Ms. Gorecki's license is suspended, not only will she be prohibited from engaging in the practice of law, but her Assistant State's Attorneys likewise will not be able to exercise the powers and duties of her office by virtue of the authority she has vested in them.

Clearly, however, it would be impractical and contrary to public policy to allow the duties of the State's Attorney to lie dormant during the period of Ms. Gorecki's suspension. Section 3-9008 of the Counties Code (55 ILCS 5/3-9008 (West 2002)) provides a mechanism

pursuant to which a Special State's Attorney may be appointed to perform the duties of a State's Attorney in certain circumstances:

*Whenever the State's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the State's attorney would have had if present and attending to the same, and in case of a vacancy of more than one year occurring in any county in the office of State's attorney, by death, resignation or otherwise, and it becomes necessary for the transaction of the public business, that some competent attorney act as State's attorney in and for such county during the period between the time of the occurrence of such vacancy and the election and qualification of a State's attorney, as provided by law, the vacancy shall be filled upon the written request of a majority of the circuit judges of the circuit in which is located the county where such vacancy exists, by appointment as provided in The Election Code of some competent attorney to perform and discharge all the duties of a State's attorney in the said county, such appointment and all authority thereunder to cease upon the election and qualification of a State's attorney, as provided by law. Any attorney appointed for any reason under this Section shall possess all the powers and discharge all the duties of a regularly elected State's attorney under the laws of the State to the extent necessary to fulfill the purpose of such appointment, and shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended. (Emphasis added.)*

Under the provisions of section 3-9008 of the Counties Code, the court may appoint a Special State's Attorney whenever the State's Attorney is unable to attend to any cause

or proceeding which it is or may be his or her duty to prosecute or defend. It is clear that during her four-month suspension, Ms. Gorecki will be "unable to attend \* \* \* [to] any cause or proceeding." Therefore, in accordance with section 3-9008 of the Counties Code, the "court in which said cause or proceeding is pending" may appoint a "competent attorney to prosecute or defend such cause or proceeding."

Moreover, where the absence or inability of the State's Attorney to attend to any cause or proceeding extends beyond a short period of time, it may be more practical for the circuit court to make a single appointment of a Special State's Attorney to handle all matters pertaining to the office of the State's Attorney than to make case by case assignments. The circuit court may, in its discretion, appoint a Special State's Attorney to serve for the period of Ms. Gorecki's suspension rather than make an appointment in each individual proceeding. The current Assistant State's Attorneys may assist the appointee (or appointees) and may execute the powers of their offices pursuant to authority granted to them by a Special State's Attorney, at his or her direction.

In summary, it is my opinion that Ms. Gorecki's suspension from the practice of law based on her violation of the Rules of Professional Conduct will preclude her from practicing law or executing the duties of the office of Kane County State's Attorney for four months beginning February 1, 2004. Although this disciplinary suspension will not cause a vacancy in the office of State's Attorney for the remainder of her term, it will prevent her Assistant State's Attorneys from exercising the powers that they derive from her during the four-month

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suspension. To avoid the problems presented by this situation, the circuit court may appoint one or more Special State's Attorneys to perform the duties of the State's Attorney during the period of her suspension.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" and last name "Madigan" clearly distinguishable.

LISA MADIGAN  
ATTORNEY GENERAL